



ENFORCEMENTS OF ANTITRUST LAWS: GLOBAL CHALLENGES

**"THE IMPLICATIONS OF GLOBALISATION ON COMPETITION:
CHALLENGES AND REMEDIES"**

10th AGON WORKING PAPER
August 2016

AGON PARTNERS
Competition Law & Policy – Switzerland
Wiesenstrasse 17
CH-8008 Zürich
www.agon-partners.ch



Legal | Academics | Events | Public Affairs

I.	DEVELOPMENTS	3
	A. Enforcement and Globalization	3
	1. <i>Jurisdiction</i>	3
	2. <i>Industry</i>	3
	3. <i>Digital Economy and E-Commerce</i>	4
	B. Increase of "Cross-Border" Issues	4
	1. <i>Authority: Merger Control</i>	5
	2. <i>Companies: Cartels</i>	6
	3. <i>Lawyers: Advisory</i>	7
II.	CHALLENGES: CARTELS, MERGERS AND DOMINANCE	7
	A. Cartels	8
	1. <i>Leniency Programmes</i>	9
	2. <i>Private Damage Claims</i>	12
	B. Mergers	13
	1. <i>Rules</i>	14
	2. <i>Control</i>	16
	C. Abuse of dominance	16
	1. <i>US</i>	17
	2. <i>EU</i>	18
III.	COMPLIANCE AND REMEDIES	18
	A. Compliance	19
	1. <i>Companies</i>	19
	2. <i>Authorities</i>	20
	3. <i>Collaboration</i>	20
	B. Harmonisation	21
	1. <i>Challenges</i>	22
	2. <i>Effects</i>	23
	3. <i>Improvements</i>	23
IV.	FINAL REMARKS	28

I. DEVELOPMENTS

1. The increasingly cross-border dimension of international business, in addition to the growing number of competition agencies (enforcers) creates additional complexity for cases with a multi-jurisdictional element.

A. Enforcement and Globalization

2. In recent years, the world has recognized the important and vital role of competition law enforcement as an essential element to protect the integrity of free markets from anti-competitive conducts. It has been established that competition policies promote economic growth, consumer welfare, and a vibrant economy.

1. Jurisdiction

3. More and more jurisdictions¹ have now adopted antitrust and competition enforcement rules with various substantive elements of the laws and procedures, differing from one jurisdiction to another. The expansion in the number of competition regimes in recent years has created significant challenges in the application of different rules of competition laws and policies varying from one another, especially in the current context of world globalization of markets and deregulation.

4. In the year of 1990, only 23 jurisdictions had a competition law body and 16 had antitrust enforcement agencies. The world witnessed a growth of more than 500% in the number of competition agencies between 1990 and 2013. In the year 2013, 127 jurisdictions had a competition law body, 120 of which a functioning competition enforcement authority².

5. Today, more approximately 150 jurisdictions currently enforce antitrust laws, including young and small agencies of developing economies. The majority of the competition agencies differentiate in almost all aspects of functionality, for example the institutional set-up, competition regime and policy, degree of autonomy and independence of adopting decisions, etc. Not all countries are similarly active in enforcing their competition laws, especially in cases where companies with anti-competitive misconduct are located outside their borders.

2. Industry

6. Economies are growing even closer together and becoming more interdependent, multinational companies and economic entities tend to operate increasingly across borders.

7. The speed of the proliferation of competition laws and competition agencies around the globe, as well as the boost of international trade and technological revolution which resulted in the emergence of increasingly cross-border transactions, created many challenges to the enforcement of competition.

¹ The International Competition Network (ICN) has 126 members from 111 jurisdictions (Vision Statement by steering Group Chair Andreas Mundt, Sept. 2013)

² Organization For Econ. Co-operation and Dev., (OECD) report (2014), "Challenges of International Cooperation in Competition Law Enforcement".

8. The expansion of the service industry, network industry, the apparent change in technology and the growth of the digital economy had a critical impact on traditional industry, demanding the necessity of adjustments of instruments and priorities of competition policies. Constant developments in the digital economy need to be reflected on the modification and creation of competition tools and legal context, ensuring they show a rapid adaptability to the new digital environment.

3. Digital Economy and E-Commerce

9. With the development of digital economy the trends of online trading and e-commerce surfaced, presenting great benefit to consumers and competition regarding prices and diversity. Competition agencies had to make revisions on their laws and regulations while taking the limitations of growth and expansion of the online trading market into account. The French Autorité de la Concurrence's³ 2012 sector inquiry on e-commerce⁴ constitutes an informed assessment of the benefits provided to consumers based on data collected from various significant sectors⁵.

10. In the case of Pierre Fabre⁶ the French Autorité de la Concurrence considered a ban imposed by a manufacturer in the market of cosmetics and personal care products on an approved dealer to sell its products online was a restriction on passive sales. Consequently it was considered as hardcore restriction on competition, excluding the benefit of the block exemption regulation. The European Commission and a court of justice preliminary ruling in 2011 confirmed the same analysis undertaken by the Autorité de la Concurrence, stating that a general and absolute ban on online sales against an authorised distributor was a restriction by object⁷.

11. The introduction of domestic economies into an increasingly globalized economy has had a significant impact on the enforcement policies and activities adopted by competition authorities.

B. Increase of "Cross-Border" Issues

12. Competition enforcement is no longer limited within borders and to a certain jurisdiction, with business transactions having international dimensions and made across borders. Globalization is the reason why markets have become more dynamic in the international arena, requiring a significant level of efficient enforcement tools to maintain a good competitive atmosphere.

³ Key note remarks of Bruno Lasserre, President de l'Autorité de la Concurrence, on the 42nd annual Conference on International Antitrust Law and Policy at Fordham Competition Law Institute, October 1, 2015.

⁴ Autorité de la Concurrence, Opinion No. 12-A-20 from September 18, 2012 on the operation of competition in e-commerce.

⁵ The study proceeds in particular to compare online and offline prices for identical products and finds that, on average, prices are lower on merchant websites than in brick-and-mortar equivalents.

⁶ Conseil de la concurrence, Decision No. 08-D-25 of 29 October 2008 concerning the practices implemented in the cosmetics and personal care product sectors.

⁷ ECJ, Case C-439/09 of 13 October 2011, Pierre Fabre Dermo-Cosmétique vs. President of the Autorité de la concurrence: "Article 101, paragraph 1, TFUE must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the Internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified."

13. The rising global economic interdependence and the increase in the share of emerging economies in different business transactions have created many cross-border merger cases and cartels.

1. Authority: Merger Control

14. Since the 1990s the world has witnessed a significant increase in the number of merger and acquisition transactions and agreements between international competitors with a cross-border and international dimension.

15. The OECD carried out an analysis of data from 63,824 deals and investment stakes in Dealogic's Global M&A Database⁸ from 1995 to 2011. The analysis revealed that the number of cross-border deals has grown, from an average of 3,513 per year during the five years from 1995-1999 to 7,523 per year over the five years from 2007-2011.

16. The trade activities changed during the last decade, with more than 50% of world trade being currently among OECD member countries and more than 75% include OECD countries as importer or exporter⁹.

17. The introduction of many smaller Asian and African countries with developing economies has raised the share of world trade. Business traders from Europe, the United States, Japan have changed, especially with the introduction of China as a serious competitor in the international trade.

18. In general the change in the world of business and trade is well reflected in cross-border deals. An acquisition of 50% or more shares of a company headquartered in one country by a company headquartered in another country, is considered as a case of cross-border notifiable deal in competition and antitrust language.

19. It is worth mentioning that not most of these cross-border transactions have to be subject to a merger multi-filing requirement, it also depends on the turnover of the merging parties and their geographic allocation.

20. Such change in the trends of international trade means a growing number of the challenges faced by international traders being part of international cross-border transactions and having to undergo multiple merger filing under multiple jurisdictions and regimes.

a) Case Study (GE/Honeywell)

21. In the famous merger case of General Electric (GE) and Honeywell in 2001 the Antitrust Division of the US Department of Justice approved the merger, while the European Commission prohibited it, finding the merger incompatible with the common market¹⁰.

⁸ Dealogic Global M&A Database

⁹ Organization For Econ. Co-operation and Dev., (OECD), report (2014), "Challenges of International Cooperation in Competition Law Enforcement".

¹⁰ Case COMP/M.2220, General Electric/Honeywell v. Commission (2001) [hereinafter GE/Honeywell], available at: http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf

22. The GE/Honeywell case emphasized the incompatibility of national and regional laws with global markets. International business traders are faced with the problem of international cross-border merger transactions without existent international common competition laws and regimes.
23. Based on their investigation, the European Union concluded the merger was anticompetitive whilst the United States considered the merger pro-competitive.
24. In their investigation the European Union stated said merger will be a reason to lessen and harm competition, as it promotes the creation of a horizontal overlap in engines for large regional jets and corporate and small regional jets, strengthening GE's dominant position.
25. Secondly, the European Union saw a potential case of bundling and tying. With the merged firm having many sets of complementary products, including products in which it was dominant, it would help create the incentive to engage in mixed-product tying and bundling.
26. Thirdly, as Honeywell is a big supplier of engine controls, it has the power to disrupt the supply of engine controls or to rise the competitors' costs and therefore strengthening GE's dominant position, the EU considered it a vertical foreclosure of competing engine manufacturers.
27. Contrarily to the above stated arguments, the Americans held that the merger would make the prices fall and criticised the European approach. Such diverging rules of competition policies may be hindering economic growth of global markets.
28. Resulting from such merger cases the United States and the European Union have tried to address the main challenges by creating more converging rules in dealing with mergers cases and a harmonisation policy was later then installed¹¹.

2. Companies: Cartels

29. As international business transactions increased, international competitors grew closer and therefore the number of potential cross-border cartels rose. Nowadays, competition agencies worldwide deal with not only domestic cartels but also with cross-border cartels involving anti-competitive conducts by companies in at least two jurisdictions.
30. In recent years, the rate of international fines imposed by US authorities on cartels has augmented to more than 90%. The count of cartel cases detected by the European Union involving undertakings from outside the EU increased by more than 450% since 1990.
31. Starting the early 1990s, the world has witnessed a rising number of cross-border cartels. Based on the Private International Cartel (PIC) database¹², competition enforcers have in aver-

¹¹ Remarks by Deborah Platt Majoras, Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice, (November 29, 2001), "GE-Honeywell: the U.S. Decisions", also available at: <https://www.justice.gov/atr/speech/ge-honeywell-us-decision>. It can be noted, that even though the substantive framework may have converged more since the GE/Honeywell days, there are still divergent outcomes possible depending on the facts of the transaction.

age detected 3 cross-border cartels a year between 1990 and 1994. Recently, from 2007 to 2011 an average of 16 cross-border cartels have been revealed per year. The data indicates an increase of 527% in cross-border cartel enforcement between the years 1990-1994 and 2007-2011.

32. For the United States Department of Justice (DOJ), detecting and prosecuting international cartels has become one of the most important priorities of the department, as it recognised the negative and harmful impact international cross-border cartels have on American businesses and consumers.

33. More than 40 foreign defendants have been incriminated with imprisonment sentences in the United States for their participation in an international cartel or for obstructing an investigation of an international cartel.

a) Case Study (Vitamins case of 1999)

34. The vitamins case is one of the biggest cross-border cartel cases, where the Department of Justice incriminated twelve individuals, including six European executives who were sentenced to serve jail time in US prison for their participation and role in the vitamins conspiracy.

35. A Swiss pharmaceutical giant, F. Hoffmann-La Roche Ltd agreed to plead guilty and paid a criminal fine of \$ 500 million for being a leader in a worldwide conspiracy of raising and fixing prices and allocating market shares for certain vitamins sold in the United States and other countries. "These prosecutions demonstrate that we will not allow international cartels to prey on American consumers in our globalised economy," said Attorney General Janet Reno. "Those currently engaged in or contemplating similar conduct should take note of the high cost of getting caught— \$ 500 million is not only a record fine in antitrust case, but it is the largest fine the Justice Department has ever obtained in any criminal case."¹³

3. Lawyers: Advisory

36. The emergence of very connected globalised business activities and the rise of a highly regulated environment requires well informed antitrust practitioners and counsels with international capabilities and knowledge of local enforcement regimes, a comprehensive professional expertise of different major antitrust systems of various topics of mergers, cartel and antitrust investigations and litigation.

II. CHALLENGES: CARTELS, MERGERS AND DOMINANCE

37. Although there has been a significant rise of globalisation and an increase in the cross-border dimension of business transactions, the enforcement of competition laws has remained

¹² The PIC database is a highly detailed list of cartel cases around the world produced by Professor John Connor. Organization For Econ. Co-operation and Dev., (OECD) report (2014), "Challenges of International Cooperation in Competition Law Enforcement".

¹³ Department of Justice Release of May 20, 1999 "F. HOFFMANN-LA ROCHE AND BASF AGREE TO PAY RECORD CRIMINAL FINES FOR PARTICIPATING IN INTERNATIONAL VITAMIN CARTEL"

primarily a domestic exercise and therefore creating complexity for cases with a multi-jurisdictional element¹⁴.

38. One can say that most competition laws and regimes have similar goals with common elements, including prohibitions against cartels, review of mergers based primarily or exclusively on their effects on competition, and an ability to take action against companies with market power having an anti-competitive misconduct.

39. In reality, such competition laws and regimes of major international trading nations vary in all aspects and have major differences that lie in the substantive competition policies, enforcement processes and procedural rules. Such differences are due to economic, legal, cultural and historical aspects of the respective countries.

40. The lack of a universal set of standards and procedures adopted by regulators and anti-trust enforcement agencies around the globe created many challenges companies and practitioners are facing nowadays, from different procedures of leniency applications in cartel cases to filing for merger cases under multi-jurisdictional laws.

A. Cartels

41. Cartels develop beyond the borders of different national jurisdictions, the global dimension is presenting a factor of complexity, while competition enforcers still remain limited within their boundaries and therefore ignoring the global nature of the transaction.

42. Especially cartel members of an international cross-border transaction face the dilemma of having to comply with all local jurisdictions of their transaction and evaluate where the effects of such cross-border transaction may emerge.

43. The divergence of substantive and procedural rules of different jurisdictions discourages the cartelists from self-reporting and therefore undermining the tools created by competition authorities in order to detect their wrongdoings.

44. Despite the similarities between the American and the European competition policies' aims, there are many significant disparities still existing between both systems¹⁵.

45. Europe has an administrative system for antitrust enforcement sanctioning undertakings/companies with fines, and not individuals. The current European legal system does not provide for criminal sanctions, and in particular, custodial sanctions. National legislation within some European member states may however provide for criminal sanctions where individuals participate in the infringement of national anti-cartel legislations.

46. In contrast, the US antitrust enforcement is based on criminal law with financial and custodial penalties against individuals. Private enforcement is of great importance in the US system

¹⁴ Organization For Econ. Co-operation and Dev., (OECD), report (2014), "Challenges of International Cooperation in Competition Law Enforcement".

¹⁵ Ann O'Brien, Senior Counsel to the Deputy Assistant Attorney General for Criminal Enforcement, (June 6, 2008), "Cartel Settlements in the U.S. and EU: Similarities, Differences and Remaining Questions" available at : <https://www.justice.gov/atr/speech/cartel-settlements-us-and-eu-similarities-differences-remaining-questions>.

where victims of anticompetitive misconduct are awarded damages treble the amount of the actual damage.

1. Leniency Programmes

47. International cartelists tend to hesitate before applying for leniency programmes, since the terms and conditions of application and qualification conflict between jurisdictions¹⁶. The incentive to self-report is thereby reduced.

48. Practitioners who have represented international leniency applicants have raised the issues inhibiting potential violators from self-reporting:

- a) **Uncertainty:** After the opening of an investigation, whether leniency is still available depends on the model of each jurisdiction. A company could possibly be granted leniency in one country, but not necessarily in another.
- b) **Disclosure of identity/private claims:** The risk of having the identity of the applicant being exposed to several civil litigations may prevent someone from self-reporting, especially in view of multiple jurisdictions private damage claims are particularly class action litigation.
- c) **Confidentiality issues:** Absence of clear confidentiality policy in some jurisdictions setting the exact conditions of how a competition agency will handle all the information received from the applicant. This also raises the question of how the competition authority will co-operate with other enforcement bodies and not having a premature disclosure of leniency documents.

49. Agencies must be careful when designing their programmes in order to avoid conflicts with the programmes adopted by agencies in other countries.

a. Common Criteria and Reporting Systems

50. Fighting and detecting cartels has always been the main challenge of competition agencies, trying to reveal what the companies are always concealing with sophisticated means and creative practices.

51. Therefore, authorities work on developing tools and instruments of anti-cartel enforcement such as leniency and amnesty programmes in order to obtain the necessary evidence to prove the infringement, detect and uncover secret cartels¹⁷.

52. For a cartel member to have full immunity or the best treatment a programme offers, he generally has to satisfy all of the following criteria:

¹⁶ Michele Polo, Bocconi University, Milan, Massimo Motta, European University Institute, Florence, Universitat Pompeu Fabra, Barcelona (May 31, 2005), "Leniency Programmes".

¹⁷ Organization For Econ. Co-operation and Dev., (OECD), "Using Leniency to Fight Hard Core Cartels" available at <http://www.oecd.org/daf/competition/1890449.pdf> .

- a) The applicant must be the first to report or the first to present evidence to the authority.
- b) Upon reporting the misconduct, the applicant must take prompt and effective action to terminate its part in the activity.
- c) The applicant must report and provide full and continuing cooperation to the competition authority throughout the investigation.
- d) During the application, the competition agency must either be unaware of the cartels activity or have insufficient evidence to uncover the misconduct against the applicant.
- e) The applicant must not have been the leader or have forced another party to participate in the illegal activity or an originator of the activity.

53. Most of leniency applications are based on the principle that the first applicant to self-report will be granted immunity.

54. There are usually two systems of such reporting: The “First through the door” approach: This approach was created in the US, it grants immunity to the first eligible applicant. The authority doesn’t look at the quality at the evidence the applicant provided. It is sufficient to define the cartel and to determine whether there has not been another applicant that already has been granted immunity.

55. This kind of approach does not require an evidentiary standard, its target is to create a race to self-report in order to uncover the misconduct as soon as possible. Named programmes are successful based on the increase in the number of applications made based on them. The procedure is only applied when the first-in reports the illegal activity before an investigation is underway (cases of US and EU).

56. The second reporting system is the first to provide a “certain standard of evidence”: These types of programmes have a stronger focus on the evidence brought by the applicant. However it was shown that this approach is less attractive, as it leaves the applicants hesitant and uncertain about the value of evidence they intend to offer. It also presents complications in the timing of the application, since immunity may not be granted to the first one to report but instead to the first to report “good” evidence meeting the evidentiary threshold put by the agencies.

b. US Leniency Programme: A Success Story of Export

a) US

57. A leniency programme was first implemented in 1978 by the Antitrust Division¹⁸. It was characterised by prosecutorial discretion, hence lacked legal certainty to applicants. The issu-

¹⁸ Scott D. Hammond, Director of Criminal Enforcement Antitrust , U.S Department of Justice, (November 22-23, 2004), “Cornerstones of an Effective Leniency Program.”

ance of a Corporate Leniency Policy in 1993 and a Leniency Policy for Individuals in 1994¹⁹ revised the earlier programme. Now the approach was characterised by the granting of mandatory leniency to the “first in the door” approach upon the fulfilment of some conditions.

58. Based on the Division’s leniency programme, by being the first to come forward and self-report the illegal activity and fully cooperating with the Division and meeting all other required criteria and conditions, a corporation can avoid criminal charges and fines, individuals can avoid criminal convictions, prison terms, and fines.

59. Following the DOJ’s 1993 revision of its Corporate Leniency Policy to make leniency programmes more attractive for undertakings to self-report and to cooperate with authorities, the application rates have significantly increased from one leniency application per year in 1993 to one per month²⁰. As stated by the US Principal Deputy Assistant General Renata B. Hesse, “Since that time, qualifying companies have avoided all criminal sanctions in the US by self-reporting cartel activity. This leniency programme has revolutionized our cartel enforcement, and served as a model for jurisdictions around the world²¹.”

60. The US Antitrust Division has created a number of proactive strategies for detecting anti-trust offences, among them is the policy of “Amnesty Plus”. The policy carries a proactive approach for attracting potential applicants who did not qualify for amnesty for the initial antitrust conspiracy. Because of the value of its assistance in uncovering a separate cartel it will lead to amnesty for the latter offense as well as a substantial additional reduction in the fine imposed in the first offense. Encouraging undertakings to come forward and uncover other illegal activities they are involved in, the policy is considered to be an attractive tool.

61. The discount granted by the “Amnesty Plus” depends on a number of factors: 1. The quality and strength of the evidence provided by the cooperating undertaking in the leniency product, 2. The potential significance of the violation reported in the leniency application, measured by volume of commerce involved, geographic scope, and the number of undertakings in such a conspiracy, 3. The likelihood the Division would have uncovered the additional violation in case there was no self-reporting.

b) Other jurisdictions

62. It has been established that the American leniency programme, after the introduction of the revision in 1993, is the Division’s most efficient tool in uncovering and detecting international cartels and the Department most successful leniency programme.

63. The leniency programme has served as a model for similar programmes adopted by many jurisdictions. The Division has advised many foreign governments in drafting an effective leni-

¹⁹ The Division’s Corporate Leniency Policy and Leniency Policy for Individuals are available at: <http://www.usdoj.gov/atr/public/criminal/leniency.htm>

²⁰ Department of Justice Status Report of February 2004

²¹ Principal Deputy Assistant Attorney General Renata B. Hesse, speech at the Conference on Globalisation of Competition Policy, Can There Be a “One-World Approach” to Competition Law? (June 23, 2016), available at: <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-renata-b-hesse-delivers-remarks-chatham-house>.

ency programme in their jurisdiction. Canada, Brazil, the United Kingdom, France, Ireland, the Czech Republic, and Korea have established new or revised leniency programmes similar to the US.

64. Many jurisdictions have adopted such attractive programmes aiming to motivate more applicants to self-report. In case an applicant lost the race to self-report or failed to meet some criteria for full immunity, he may still be eligible to obtain a fine reduction in exchange for his cooperation. This kind of amnesty is mainly based on the criteria of evidentiary standards unlike those required for full immunity. In the UK, Switzerland and in the EU fine reductions are up to 50% for the second applicant, other jurisdictions offer from 20% to 30% for the third applicant, and 20% for subsequent applicants.

65. The “Amnesty Plus System” was also adopted by different competition authorities. In Switzerland for example, the Swiss Competition Commission (“COMCO”) can reduce the amount of the sanction up to 80% in case an undertaking voluntarily provides information or submits evidence of further unlawful reaction of competition (amnesty plus)²².

66. The European Union has established a solid leniency programme after its revision in 2002. It presents a more transparent and predictable policy and brings the European Commission’s programme more in conformity and in line with the Division’s Corporate Leniency Policy.

67. On December 7th, 2006, the Commission adopted a revised notice on immunity from fines and reduction of fines in cartel cases (Leniency Notice). In many ways, the amendments replicate US leniency rules.

68. Convergences in leniency programmes between the US and EU has raised the incentives for undertakings to self-report and apply and simultaneously obtain immunity in different jurisdictions. This simplifies the application of the undertaking, and is therefore creating opportunities for further cooperation between the US antitrust agencies and the European Commission.

2. Private Damage Claims

69. One of the main challenges faced by enforcers and competition agencies is the interplay between leniency programmes and private claims, as a leniency application may increase the risk of a successful damage claim by the cartel’s victim.

70. The issue of having a constant conflict between a proper functioning leniency programme and private damage claims has been taken for granted and forgotten. Hence, most authorities have to compromise between the interest of public enforcement system and of private cartel victims to be fully compensated.

71. The incentive to the apply to the leniency programme, which mainly lies in the avoidance of paying a high fine, may then be hindered by the possibility of being condemned to pay damages by cartel victims or going to jail.

²² The ordinance of 12 March 2004 on Sanctions imposed for unlawful Restraints of Competition “Cartel Act Sanctions Ordinance, CASO.

72. Enforcers have been trying to attract cartelists by increasing the potential benefits of participating in the leniency programmes. On one hand, they are holding out the carrot by protecting leniency applicants from civil damages and avoiding other joint and several liabilities in following on actions for the same misconduct. On the other hand, they are taking out the stick by imposing significantly high sanctions for misconduct.

73. Under federal antitrust law, persons and companies harmed by anticompetitive conduct may seek an award three times their damages, an injunction, and costs of the action (including attorney fees) against the undertaking violating antitrust laws.

74. Undertakings may be discouraged to apply for leniency and self-report in order to avoid being attacked by the consumers with private treble damage action.

75. The US has overcome the challenge of having the problem of private damage claims hinder the smooth implementation of the leniency programmes.

76. The US adopted its recent de-trebling provision, the Antitrust Criminal Penalty Enhancement and Reform Act of 2004²³, which raises maximum penalties and fines for criminal antitrust violations and offers financial incentives for leniency applicants including de-trebling civil damages, protecting from joint and several liability in private lawsuits in exchange of cooperation with plaintiffs.

B. Mergers

77. If the authorities involved disagree about the effects of a global merger, competition enforcers may affect another's economy negatively by imposing harmful decisions the said transaction. Differences are arising because of numerous reasons, the effects may differ across countries, the laws diverge or mainly because of the distinctive ways the authorities analyse and assess the facts.

78. Blocking and closing a deal of a merger involving large global companies could interfere with global business and affect global market economies. International traders and investors undertake multiple merger filings seeking multiple separate approvals and the merger must be in conformity and satisfy the most demanding of the investigating authorities.

79. Multiple parallel investigations generate high administrative costs for companies and competition enforcers, particularly delays in closing deals can create additional costs for companies.

80. The growing number of international merger transactions is due to the increase of merger filings in the EU for deals with one company with headquarters in the EU and another outside the EU. The number merger of filings rose from 67 in 1991 to 309 in 2011²⁴.

²³ Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub L. No. 108-237, 118 Stat. 661, 665-69

²⁴ Organization For Econ. Co-operation and Dev., (OECD) report (2014), "Challenges of International Cooperation in Competition Law Enforcement".

1. Rules

81. Based on the concept of effects, authorities in various jurisdictions concerned with a merger between two global companies, headquartered in the same country may be entitled to assess the transaction. The said authorities might examine with one another, depending on their laws in particular with regards to the exchange of confidential information, the substantive question of whether the merger in scope is likely to be lessening competition as well as on the remedies.

82. Despite the coordination between authorities in the discussion of the said merger, each authority must make its decisions independently based on the interests of its jurisdiction.

83. Opposing conclusions may be made by authorities in two or more different jurisdictions for the same global merger, due to the following reasons: 1. Divergence in the substantives analysis when assessing the merger; 2. Divergence in the conditions of competition laws in defining many things such as the relevant market, etc; 3. Different outcome in the collected information and evidence and its assessment.

a. Challenge of Diverging Substantive Rules

84. Multinational companies must learn to apprehend the distinct approaches of the diverging jurisdictions based on the economic and legal system of each country. As seen in the GE/Honeywell case, the opposing and conflicting decisions made by the US and the European authorities were mainly a result of how the assessment of a merger between suppliers of complementary products was made.

85. There are cases where the laws of various countries might have conflicting substantive differences with assessment criteria in their legislation. Some countries give importance to employment effects and protection of small and medium producers as opposed to big ones.

86. Authorities assess the merger cases in varying ways, some give more weight and importance to the market shares than others. The EUs approach on evaluating cross-border merger cases seems stricter than the one from the US, but on the other hand, the US is tougher on coordinated effects cases.

87. It has been revealed that the Chinese merger control mainly focuses on promoting pro-domestic objectives, which explains the 21 prohibitions and non-conditional clearances in 2013 that all involved foreign companies²⁵.

88. Other reasons of opposing decisions between authorities lie in the different goals of competition law enforcement. In the US the goal is to ensure strong competition atmosphere, thus the focus is on preventing companies from becoming monopolists or substantially lessening competition by undertaking anti-competitive means. In Europe, the aim is mainly market integration and in China economic development.

²⁵ Mariniello, M. (2013) "The dragon awakes: is Chinese competition policy a cause for concern?" Bruegel Policy Contribution, Issue 2013/2014, October 2013.

89. Another condition that creates opposing decisions is the size of the market in the jurisdiction, blocking the merger compared to the total size of the markets for the merging firms. Narrow geographic scope could be a reason to block a merger by local authorities in some countries. This was shown in the purchase of the office supplies distributor “Office Depot” by “Staples”, which was approved by the European Commission²⁶. The approval was followed by the Federal Trade Commission’s decision to block the same deal²⁷. In this a case, the US and EU were coordinating on the same deal but in the US the merger would have given the company a monopoly of the office supplies contracts. In contrast in Europe it would have reduced the market from three companies to only two²⁸.

90. In the UK, the Competition and Markets Authority (CMA) placed a prohibition on Eurotunnel²⁹ operating ferry services at Dover, this consequently blocked a merger between Eurotunnel and SeaFrance approved by France’s Autorité de la Concurrence³⁰.

91. International business traders and global companies face many challenges when filing for mergers in multiple jurisdictions;

- a) The exchange of confidential information: authorities with bilateral cooperation agreements are unable to exchange information without the consent of the merging firms or a strong authorisation based on local or international law or treaty. With the existence of confidentiality waivers granted by merging parties, competition authorities have been able to cooperate and examine more merger cases, this was reflected in the increase of number of cross-border merger cases. Merging firms are now considering waiving their right to confidentiality in order to facilitate and help competition authorities involved to coordinate in examining the mergers.
- b) The high costs of multi-jurisdictional merger review: merging international firms not only comes with high costs financially but demands a lot of time for the cross-border merger review. The business community is pointing out the importance of reducing high costs and the need to enhance legal certainty and predictability by harmonising the basic requirements of information needed for filing. This could help in speeding up the notification process.

b. US and EU: Diverging Procedures

92. There are many differences between the American and the European systems’ procedures of merger control. In the EU, the European Commission acts as both investigator and decision-

²⁶ Mergers: European Commission approves Staples’ acquisition of Office Depot, European Commission Press release, (February 10, 2016), available at: http://europa.eu/rapid/press-release_IP-16-278_en.htm.

²⁷ On May 19, 2016, Staples and Office Depot abandoned their proposed merger after the district court granted the Commission’s request for a preliminary injunction, see: <https://www.ftc.gov/enforcement/cases-proceedings/151-0065/staplesoffice-depot-matter>.

²⁸ Margrethe Vestager- European Commissioner for Competition, Working together to Support Fair Competition Worldwide- “Check against Delivery”- UCL Jevons Institute Conference, (June 3, 2016), available at : https://ec.europa.eu/commission/2014-2019/vestager/announcements/working-together-support-fair-competition-worldwide_en.

²⁹ Eurotunnel / SeaFrance merger inquiry, Competition and Markets Authority (UK), 2013

³⁰ Autorité de la Concurrence, Decision 12-DCC-154 of 7 November 2012

maker, therefore, the EU grants the right to the parties to propose remedies. The EU merger control is considered to have a “symmetric” characteristic, the EC has to clarify whether the merger is anti-competitive or not.

93. In the United States, merger control is examined on federal level by the FTC and the DOJ, coordinating the cases at hand. Compared to the European Commission, the federal agencies are not authorised to block mergers, they must obtain an injunction from a federal court.

94. The EU “SIEC” test of the European Community Merger Regulation (ECMR): On May 1st 2004³¹ the European Union has adopted a new merger regulation changing the substantive test of merger control, the SIEC test “significant impediment of effective competition” test facilitating the referral procedures and help increased the flexibility with regards to the filing date and commitment procedures.

95. The EU adopted the said new merger regulation in order to address the so called “gap cases” making the review of US and EU to substantive issues in merger cases quite similar³².

2. Control

96. Developing and emerging economies face many challenges when regulating cross-border mergers, such as:

- a) The lack of human resources who are well specialised in the matter to implement and adopt the right decisions, as well as insufficient financial resources.
- b) Inadequate merger regulation, as authorities may not have an effective merger control regime. The majority of the developing and emerging economies have basic legal provisions, which are insufficient to efficiently examine merger control cases.
- c) Lack of competition culture with a strong factor of State control and planning leaving the private sector no freedom in the market.
- d) Problems of implementations, as implementing a merger control regime in developing and emerging economies can be slow and time-consuming.

C. Abuse of dominance

97. There is a wide divergence of regimes among competition agencies in handling unilateral conduct cases, since the rising numbers of international business activities and the proliferation of competition regimes. The objectives of each jurisdiction differs on how it treats cases of abuse of dominance, hence creating unnecessary chilling effects, disabling efficiencies for firms operating across-borders, and producing more challenging compliance burdens on the business community.

³¹ Council Regulation 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings, 2004 O.J. (L 24)

³² Lars-Hendrik Roller and Miguel De La Mano, “ The Impact of the New Substantive Test in European Merger Control” (April, 2006).

98. The distinctive objectives usually derive from different domestic, political, cultural and macroeconomic conditions reflecting in the legislative framework of each country.

1. US

99. The legislative framework both in the US and the EU differ from the times the laws have been established.

100. The Sherman Act from 1890 was enacted with the objective of common law in restraining trade by imposing more control on big economic powers during the industrialization of the country in the late nineteenth century³³.

101. Section 2 (a) of the Sherman Act prohibits the monopoly conducts, it is held very brief and general. It was interpreted differently over time by the courts depending on the economic changes in the US as well as the experience with the enforcement of section 2 to practical conduct.

102. Section 2 of the Sherman Act³⁴ makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . .". Section 2 states three offenses, "monopolization", "attempted monopolization," and "conspiracy to monopolize."

103. Unlike the EU laws, the US incriminates the "attempted monopolization" which requires proof (1) that the undertaking has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and a (3) dangerous probability of gaining monopoly power³⁵. In other words, the US incriminates potential monopolists using improper tools such as predatory pricing.

104. As for the "conspiracy to monopolize" requires under section 2 of the Sherman Act (1) the existence of a combination or conspiracy; (2) an overt act in furtherance of the conspiracy; and (3) specific intent to monopolize³⁶.

105. Recently the United States³⁷ has reviewed its restraining approach with the Antitrust Modernisation Commission (AMC). This Commission made several studies on the treatment of exclusionary conduct as well as the repeal of price discrimination rules in the Robinson-Patman Act³⁸.

106. The Department of Justice and the Federal Trade Commission held joint hearings in 2006-2007 evaluating the best ways to detect anticompetitive exclusionary conduct when enforcing

³³ Eleanor M. Fox & Lawrence A. Sullivan, "Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?", 62 N.Y.U. L. REV. 936 (1987)

³⁴ 15 U.S.C § 2

³⁵ Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

³⁶ United States v. Yellow Cab Co., 332 U.S. 218, 225 (1947).

³⁷ "The Internationalisation of Unilateral Conduct Laws - conflict, comity, cooperation and/or convergence." A. Neil Campbell, J. William Rowley, Antitrust Law Journal (Vol 75, 2008)

³⁸ Anti-Price Discrimination Act, codified at 15 U.S.C. § 13

antitrust rules under Section 2 of the Sherman Act³⁹. The US agencies announced the following⁴⁰: “In an increasingly globalised economy, in which transactions can have an impact on multiple jurisdictions, it is imperative that US businesses understand the appropriate line between pro-competitive and anti-competitive single-firm conduct and that U. antitrust enforcers are able to discuss and share with their foreign counterparts the latest legal and economic scholarship relating to these issues.”

107. In the US, enforcers and courts have been more reticent in matters of unlawful exclusionary conduct than the EU. The differences are shown clearly in cases of unilateral conduct related to intellectual property. The US courts have never incriminated unilateral conduct of unconditional refusal to licence intellectual property. The Department of Justice has not yet found a case where a unilateral conduct of unconditional refusal to licence an intellectual property right violates antitrust and competition laws. In contrast, the EU courts have incriminated such unilateral conducts acts⁴¹.

2. EU

108. The competition provisions in the Treaty of Rome provided competition law rules with a civil law tradition that emphasised the objectives of encouraging European economic and legal integration after World War II.

109. Article 102 of the Treaty on the Functioning of the European Union (TFEU) prohibits abusive conduct by companies that hold a dominant position. An infringement is considered present if the following conditions are given according to Article 102 TFEU: 1. The entity must be qualified as an “undertaking”, 2. Such undertaking must be in a dominant position on a relevant market, 3. The undertaking’s activity must qualify as an abusive act, 4. The conduct must affect trade between member states.

110. When dealing with abuse of dominance cases European courts recognise individual freedom as the main objective of competition policy and regard dominant firms as a threat to economic freedom of other market players. Furthermore, in the US courts focus mainly on the exclusionary aspects of not giving much weight or importance on overall welfare effects⁴².

III. COMPLIANCE AND REMEDIES

111. The divergence of substantive and procedural rules between jurisdictions entails in particular, two salient remedies in order to reach effective and consistent enforcement of competition laws: compliance and international cooperation.

³⁹ 15 U.S.C § 2

⁴⁰ Press Release, U.S. Department of Justice & Federal Trade Commission, to Hold Joint Public Hearings on Competition Policy Related Single-Firm Conduct (Nov 28, 2005)

⁴¹ Principal Deputy Assistant Attorney General Renata B. Hesse, speech at the Conference on Globalisation of Competition Policy, Can There Be a “One-World Approach” to Competition Law? (June 23, 2016), available at <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-renata-b-hesse-delivers-remarks-chatham-house>.

⁴² United States v. Aluminum Co. of Am., 148 F.2d 416, 430-31 (2d Cir. 1945)

A. Compliance

112. The business community has become global. With its international cross-border transactions, the dire need of an effective compliance strategy containing all necessary awareness of different systems of competition laws and rules of the countries of interests arises.

113. Strong and effective compliance strategies will help the companies to minimise the risk of involvement in competition law infringements and therefore avoiding the costs resulting from anti-competitive behaviour.

114. Companies and international firms should adopt sound compliance programmes with anti-trust rules not only as a legal obligation but also as an attitude and a culture that has positive impact on the market place.

1. Companies

115. Companies who have compliance programmes benefit from the following:

- a) Acquiring good image of progressive and ethical business
- b) Having safer internal procedures
- c) Reducing the risk of fines and benefiting from competition agencies' settlement and amnesty programmes, and/or mitigating circumstances in case of an imposed fine.

a. Reducing legal costs

116. International compliance programmes with antitrust laws, especially with the drastic growth of international business activities around the globe, ensure the prevention or early discovery of any breaches or infringements in order for the company to avoid administrative and civil liability and high costs of proceedings and legal assistance⁴³.

117. Practitioners are keen to attend international conferences of antitrust (such as the ones organised by the International Competition Network) where they hold open dialogues between competition enforcers and practitioners. Public enforcers are encouraging and facilitating the exchange of best practices on compliance among businesses.

118. Multi-national companies have been developing compliance programmes⁴⁴ for international purposes and use. As seen above, over 100 countries have adopted antitrust and competition laws, it can be stated that such laws are following either the United States or European Union model closely. Some business activities undertaken outside the United States may still have to comply with the American rules, in case they have direct, substantial and foreseeable effect on

⁴³ Brent Snyder-Deputy Assistant Attorney General of the U.S. Department of Justice Antitrust Division, "Compliance is a Culture, Not Just a Policy," (September 9, 2014).

⁴⁴ Exxon Mobil Competition "Antitrust and Competition Law - Legal Compliance Guidance", visit: <http://cdn.exxonmobil.com/~media/global/files/other/2015/antitrust-and-competition-law-legal-compliance-guide.pdf>, Akzo Nobel "Competition Law Compliance Manual" https://www.akzonobel.com/system/images/AkzoNobel_Competition_Law_Compliance_Manual_tcm9-16085.pdf

domestic or foreign market of the United States. The same concept of extraterritorial effect is being applied in the European Union and other countries.

2. Authorities

119. Compliance programmes are taken into account by some competition agencies in case of infringement. They are considered as a mitigating factor when calculating the financial penalty and sometimes as an aggravating factor resulting in an increase of the fine (the UK's Competition and Markets Authority (CMA) practices a such handling⁴⁵).

120. In the United States, the Supreme Court ruled that the intent to undertake an anti-competitive effect is a necessary element to establish a criminal violation⁴⁶. Later, in the case of United States vs. International Paper Co. the Court held that: "The mere existence of an anti-trust compliance policy does not automatically mean that a corporation did not have the necessary intent. If, however, you and that a corporation acted diligently in the promulgation, dissemination, and enforcement of an antitrust compliance programme in an active good faith effort to ensure that the employees would abide by the law, you may take this fact into account in determining whether or not the corporation had the required intent".⁴⁷

121. Nevertheless, this approach was criticised by the prosecutors believing that the mere existence of a compliance programme was not important and irrelevant to the corporate liability. Ever since, this remained the position of the Department of Justice. Said approach has been part of their amnesty programme granting complete immunity to the first cartel member to self-report regardless whether a compliance programme is existent or not.

3. Collaboration

122. Most of competition enforcement agencies demonstrate great interest and positive attitude towards compliance in order to encourage a competition compliance culture in the international market.

123. Antitrust authorities started to acknowledge the importance of compliance within the companies, since preventing anti-competitive practices is far more efficient than investigating and imposing fines on companies who have already violated the laws.

124. The European Commission's information brochure "Compliance Matters" released on 23 November 2011⁴⁸ recognised and underlined the importance of compliance and the fact that the existence of a compliance programme should not be considered as an aggravating factor.

125. The French Autorité de la Concurrence has been highlighting the importance of companies to develop compliance programmes, ordering an independent study on compliance policies in Europe (released in October 2008).

⁴⁵ OFT report "Drivers of Compliance and Non-compliance with Competition Law", May 2010.

⁴⁶ United States v. U.S. Gypsum Co, 438 U.S. 422 (1978).

⁴⁷ United States Vs. International Paper Co., Crim. Nos. 78-H-11, 78-H-12 (S.D. Tex. 1978).

⁴⁸ European Commission "Compliance with competition rules: what's in it for business?" visit: http://ec.europa.eu/competition/antitrust/compliance/index_en.html

126. The Autorité de la Concurrence also developed guidelines on compliance programmes to help mitigate fines during settlement procedures⁴⁹.

127. Recently, there have been countless efforts and increased commitment made by competition authorities (and also international business organisations) helping to facilitate practical activities by organising public seminars and information sessions for small and medium enterprises to rise the awareness. In addition, other competition authorities have been publishing corporate compliance programmes for companies to adopt and be aware of, for example the Competition Bureau of Canada released the "Corporate Compliance Programme"⁵⁰.

128. Some competition authorities have established innovative methods other than fines, imprisonment and leniency programmes, to ensure compliance. Said methods deal with the reputation of the companies, where efforts are made to discourage companies from investing in companies who have been involved in anti-competitive practices, such as cartels. Also there has been an effort in spreading competition culture in order to help the business community gain a better understanding of their behaviour towards compliance. They are also being encouraged to implement it by being offered special allowances in case of a newly established competition law, including free transitional advisory opinions on whether their existing business arrangements violate the new provisions.

129. Despite all the efforts made by competition enforcers for the business community to comply with antitrust laws, there is an increase in the number of uncovered intentional cartels for the following reasons:

- a) Encouraging amnesty and leniency programmes
- b) National cooperation among competition authorities in detecting the cartel in addition to information sharing
- c) The focus of competition authorities on international cartels more than the domestic ones
- d) The increase of the cartel formations worldwide since the early 1990s

B. Harmonisation

130. With the rapid globalisation of economic activity making a significant change on the outlook of the world economy, many challenges emerged to competition enforcement agencies. They must examine and detect anti-competitive behaviours and mergers whose effects are increasingly cross-border.

131. The increase of more than 600% in the number of jurisdictions with competition law enforcement since the 1990s and the growth of international trade as well as the global supply chains, explains why more than 90% of cartel fines imposed by the United States were interna-

⁴⁹ Business Europe position paper "Business Compliance with Competition Rules", 28 November 2011.

⁵⁰ Visit Competition Bureau of Canada at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html>

tional. In addition, the European Union has also witnessed a rise in the number of cartel cases from 450% since 1990 involving undertakings outside the EU⁵¹.

132. Competition enforcement agencies are showing efforts to overcome the challenges faced by globalisation and reach for a convergence among multiple jurisdiction of the substantive and procedural rules. Recently, competition authorities have been focusing to harmonise and ensure that different jurisdictions adopt common principles and tools for the examination of anti-competitive conducts and mergers.

133. Despite the disparities between national competition statutes, most authorities agree on the goals and focus of competition laws and regulations: Aiming for competition principles for a strong competition policy and the right tools to investigate and analyse business conducts and transactions.

1. Challenges

134. Future challenges for cooperation will continue to occur as a result of the significant increases in the complexity of litigation and rules, as the world economy continues to globalise and the most recent competition authorities in fast-growing emerging economies become more active. Hence, methods and tools of cooperation could usefully evolve in order to address future challenges. This is what the OECD and other international bodies have been trying to attain by cooperating with many competition enforcement agencies and practitioners⁵².

135. Said challenges can hinder the global economic growth of the world economy and discourage global companies to merge. Especially the existence of high administrative costs from multiple parallel investigations and the delay for closing deals can be very harmful to businesses.

136. Furthermore, international cartels are investigated by different authorities and are analysed in light of multiple jurisdictions. Thus inconsistencies in the decisions are very likely. Particularly in cases where the cartel has effects in one jurisdiction but the firms involved are located elsewhere, enforcement might face difficulties in the assessment of the misconduct.

137. The challenges are more significant when one jurisdiction fails to cooperate. Additionally, in case of a leniency application, the competition authority will not be able to open an investigation and prosecute an international cross-border cartel.

138. Therefore, competition authorities are in need for cooperation. In case they are being faced with a global cartel they must be able to coordinate the raids and share evidence with one another and finally have mutual recognition of fines and prison sentences.

⁵¹ Organization For Econ. Co-operation and Dev., (OECD) report (2014), "Challenges of International Cooperation in Competition Law Enforcement".

⁵² Organization For Econ. Co-operation and Dev., (OECD), Revised Recommendation of the Council Concerning Co-operation between Member countries on Anticompetitive Practices affecting International Trade (1995), available at <https://www.oecd.org/daf/competition/21570317.pdf>.

139. Coordinating raids is of primary importance to ensure evidence is not being destroyed. The US Department of Justice and the UK Office of Fair Trading coordinated raids during the course of their respective investigations in the Marine Hose case⁵³.

2. Effects

140. The consequences from failure to cooperate can be very serious. A decision to block a merger may bring harmful externalities on another country's economy in case of a disagreement on the effects between authorities with regards to the global merger.

141. Such effects differ from one country to another, in addition to the difference of laws and assessment of facts, resulting in the blocking of efficient mergers and other times accepting harmful merger by to certain jurisdiction.

142. Due to such divergent jurisdictional decisions, negatively affected merger deals had a value of approximately USD 100 billion and the annual administrative costs arising from multiple merger filings exceeded in total several million USD. Moreover, damages to consumers affected from undetected cartels could exceed USD 100 million⁵⁴.

143. Despite the numerous benefits gained from international cooperations, many authorities refrain from engaging in them and position themselves against the harmonisation of legislation. This is mainly due to their distinct political and economic nature and the confidentiality concerns of those countries.

144. However, the damages from failure to coordinate can be substantial. In case authorities are unable to cooperate effectively in investigating cartels, unlawful cartel practices could remain unpunished and future destructive behaviour will not be prevented. Furthermore, additional costs could be burdened on the global economy, and consumers would be continuously harmed.

3. Improvements

145. There is a number of steps that competition authorities can undertake to improve global compliance and pave the way to harmonised legislations in order to avoid an increased potential for inconsistent or conflicting competition law enforcement decisions, among which are:

146. Enhanced bilateral co-operation, such as allowing the exchange of confidential information between enforcers to better serve the bigger picture;

⁵³ Organization For Econ. Co-operation and Dev., (OECD) report (2014), "Challenges of International Cooperation in Competition Law Enforcement".

⁵⁴ Organization For Econ. Co-operation and Dev., (OECD) report (2014), "Challenges of International Cooperation in Competition Law Enforcement". Cross-border M&A deals affected by divergent competition law decisions include Boeing-McDonnell Douglass, reportedly worth USD 13 billion see at: <http://www.nytimes.com/1996/12/16/business/boeing-offering-13-billion-to-buy-mcdonnell-douglas-last-us-commercial-rival.html> , GE-Honeywell, reportedly worth USD 45 billion (<http://abcnews.go.com/Business/story?id=89173>) and Glencore-Xstrata, reportedly worth USD 41 billion, see at: <http://www.bloomberg.com/news/articles/2012-02-07/glencore-xstrata-agree-on-90-billion-merger-of-equals->.

- a) Developing legislative/regulatory frameworks standards that would allow sharing of information and incorporate legislative protections for information that are received from counterpart regulators;
- b) Setting common form waivers and suggestions that aim to facilitate the use of such waivers;
- c) Adopting multi-lateral instruments that target tackling the most pressing needs for cooperation. These could relate, for example, to information sharing, merger notification, or leniency policies convergence for cartel investigations;
- d) Setting international standards for formal comity, for example, a legal instrument that defines the criteria for requesting an enforcement action or assistance to another authority, and clarifying the participating authorities' comity obligations;
- e) Allowing authorities the freedom to choose to recognise the decisions of other competition authorities within the cross-border investigation. There could be an agreement for providing non-binding deference to one 'lead authority';
- f) Establishing a multi-lateral agreement for information exchange, comity and deference standards based on jurisdictions voluntarily deciding on the agreement.

a. Cooperation on Information Exchange

147. Exchange of information among competition enforcement agencies is an extremely crucial form of cooperation and also a very sensitive one. It constitutes the most important element to assist in the detection of the anti-competitive violation⁵⁵.

148. Without effective cooperation between authorities, an investigating authority might face difficulties in obtaining needed information from overseas authorities, especially if the headquarters of the companies investigating are located elsewhere or the witness to be interviewed are outside the jurisdiction.

149. There are significant concerns about exchanging confidential information across borders which can restrict the sharing of such information. Practical forms of cooperation can be affected according to the type of enforcement regime available for cartels, meaning whether a regime has criminal or civil/administrative systems and whether there is an alternative to private action against cartels⁵⁶.

150. The refusal to share information is followed by consequences. One among them is that countries, where consumers have suffered harmful effects from a global cartel, are not able to prosecute the cartel for the violation committed in accordance with the laws of the countries.

⁵⁵ Model Waiver of Confidentiality For Use in Civil Matters involving non-U.S. Competition Authorities: visit : https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/model_waiver_of_confidentiality.pdf.

⁵⁶ Model Waiver of Confidentiality For use in Civil Matters involving non-U.S. Competition Authorities, Frequently Asked Questions, visit: https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/waivers_faq.pdf.

Eventually, most countries in which violations took place may not have access to the necessary evidence in order to determine the guilt or innocence of the involved parties.

151. Consequently, cartels may at times remain undiscovered due to the absence of cooperation. This can be very costly, as studies indicate that cartels that have been discovered can have great impacts. For example, Clarke and Evenett (2003) estimated that the vitamins cartels overcharges to consumers were nearly USD 789 million, while Levenstein and Suslow (2001) have proved that the overcharges to developing countries of 16 international cartels were approximately USD 16 billion.

152. When engaging in a cooperation of information exchange, jurisdictions must act with the needed flexibility depending on the circumstances of each case and should enforce appropriate safeguards to protect the information exchanged in the receiving jurisdiction and protect the due process rights of the concerned parties.

153. With the recognition of the importance of cooperation and the harm of international cartels, the OECD has released in 1998 Recommendations concerning Effective Action against Hard Core Cartels⁵⁷ which are particularly important from an international perspective. Thus they are underlining the fact that international cooperation is vital among enforcement agencies. "The recommendation helped spur the surge in international anti-cartel enforcement and the unprecedented levels of cooperation that we see on the cartel front today"⁵⁸.

154. In the year 2000 the report of the International Competition Policy Advisory Committee (ICPAC)⁵⁹ was published, suggesting recommendations with regards to the challenges of international competition policy issues facing the US, establishing the main guidelines for international policy at the US Department of Justice. The Report mainly stated three principles of cooperation: 1. Expanded cooperation between the US and other foreign competition authorities, 2. More convergence of systems, and 3. Increased transparency and accountability of government actions⁶⁰.

155. The Federal Trade Commission and the Department of Justice have jointly released on September 25, 2013 a model waiver of confidentiality for use in civil matters involving foreign competition authorities⁶¹.

156. Such waiver enables parties involved in an investigation to choose to waive confidentiality protections by signing it. A waiver provides the terms on which the parties agree to waive stat-

⁵⁷ Organization For Econ. Co-operation and Dev.,(OECD) Recommendations and Best Practices: Recommendation of the Council concerning Effective Action against Hard Core Cartels of 1998, see at <https://www.oecd.org/daf/competition/2350130.pdf>.

⁵⁸ Rachel Brandenburger, Transatlantic Antitrust: Past and Present (May 21, 2010), available at: <https://www.justice.gov/atr/file/518271/download>.

⁵⁹ ICPAC was an independent panel chaired by former Assistant Attorney General Jim Rill and former Chair of the U.S. International Trade Commission Paula Stern. Its members comprised distinguished individuals representing broad legal, economic, and business experience and expertise, Rachel Brandenburger, Transatlantic Antitrust: Past and Present (May 21, 2010), available at <https://www.justice.gov/atr/file/518271/download>.

⁶⁰ Rachel Brandenburger, Transatlantic Antitrust: Past and Present (May 21, 2010), available at: <https://www.justice.gov/atr/file/518271/download>.

⁶¹ Model Waiver of Confidentiality For Use in Civil Matters involving non-U.S. Competition Authorities: visit : https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/model_waiver_of_confidentiality.pdf.

utory confidentiality protections in front of the agency originally receiving the entity's confidential information. It clarifies an agency's policy on how it will handle the information received from another, although it is not an agreement signed by the agency. Such waivers are only made for sharing confidential information among the investigating agencies listed by the parties in the waiver⁶².

157. Member states within the European Union present an advanced form of cooperation that helps with exchange of all types of information. Within the closed framework of the European Competition Network (ECN) information can be exchanged with one another and with the European Commission.

158. There are types of agreements established for information exchange such as the "Second Generation Agreement", it was made between Switzerland (Swiss Competition Authority COMCO) and the European Commission at the end of 2014⁶³.

159. In order to achieve the best case scenario when authorities exchange confidential information in cartel investigations, the 2005 Best Practices for the Formal Exchange of Information in Cartel Investigations⁶⁴ have found a way to remedy the confidentiality concerns, aiming to identify safeguards that member countries should deem.

160. The OECD Best Practices invite member states to support the process of exchanging information in cartel investigations. When initiating an exchange of information, jurisdictions should act with the essential flexibility in accordance with the circumstances of each case and should apply suitable safeguards to protect the information exchanged and guard the due process rights of the parties involved, hence encouraging a maintained open dialogue and a better global compliance.

b. Forms of Cooperation: Agreements and International Organisations

161. There is more than one form of international cooperation and open dialogue. Within the competition field, international cooperation uses two types of comity: negative comity and positive comity. The negative or traditional comity involves a country's consideration of how to prevent its own laws and law enforcement actions from negatively harming another country's interests.

162. The OECD's Successive Recommendations on Co-operation in Competition Matters from 1995⁶⁵, suggested that in seeking to implement negative comity, a country should notify other countries when its enforcement actions may affect their interests, and give full consideration to

⁶² Model Waiver of Confidentiality For use in Civil Matters involving non-U.S. Competition Authorities, Frequently Asked Questions, visit: https://www.ftc.gov/system/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/waivers_faq.pdf.

⁶³ "Passport to International Antitrust", Prof. Dr. Patrick L. Krauskopf (article Published by the Canadian Bar Association, National Competition Law Section International Committee, edition Summer 2015), p. 2.

⁶⁴ Organization For Econ. Co-operation and Dev (OECD) Best Practices for the Formal Exchange of Information in Cartel Investigation, see at: <http://www.oecd.org/competition/cartels/35590548.pdf>

⁶⁵ Organization For Econ. Co-operation and Dev., (OECD), Revised Recommendation of the Council Concerning Co-operation between Member countries on Anticompetitive Practices affecting International Trade (1995), available at <https://www.oecd.org/daf/competition/21570317.pdf>.

ways of fulfilling its enforcement needs without harming those interests. While on the other hand, positive comity involves a request by one country inquiring another country to participate in enforcement activities in order to treat an anti-competitive conduct that is significantly affecting the referring country's interests.

163. The OECD Recommendations also identify "Investigative Assistance" as a mean to strengthen enforcement in one jurisdiction with the help of competition enforcers in other jurisdictions. It might be confusing to distinguish "Positive Comity" from investigatory assistance. The difference between both is the positive comity on one hand, involves investigating anti-competitive practices and treating them if possible in order to assist the requesting country. The actions are therefore applied by the country receiving the request. On the other hand, investigatory assistance, such as sharing or gathering information on behalf of a foreign country, involves a request for assistance within the requesting country's enforcement action. The concepts are considered similar, but raise different legal and political issues.

164. International cooperation among competition authorities has significantly improved with the increase of number of types cooperation agreements, usually bilateral with the exception of the European Union for having its own network of cooperation on a regional level between national authorities (European Competition Network)⁶⁶. This has proven to be the most advanced example of form of cooperation.

165. One of the success stories of cooperation between nations is the 1991 US/EU bilateral Cooperation Agreement⁶⁷ which was essential in strengthening the cooperative relation between the Antitrust Division and the European Commission. The said agreement provides for "mutual notification of enforcement activities regarding each other's important interests; exchange of non-confidential information and regular meetings among the agencies; cooperation and coordination of enforcement activities; consideration of requests by one party to pursue enforcement activities against anticompetitive conduct affecting the interests of the requesting party; and taking into account at all stages of enforcement, the important interests of the other party"⁶⁸.

166. Moreover, based on twenty years of cooperation, the US Department of Justice, the Federal Trade Commission and the Competition Directorate-General of the European Commission issued on October 14th, 2011 the "Revised Best Practices on Merger Cooperation"⁶⁹. It covers cases where a US agency and the Competition Directorate-General of the European Commission are reviewing the same merger. Such cooperation on reaching best practices helps the EU and the US making consistent decisions when analysing and reviewing the same merger.

⁶⁶ European Competition Network: http://ec.europa.eu/competition/ecn/index_en.html.

⁶⁷ Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, Sept. 23, 1991, available at <http://www.justice.gov/atr/public/international/docs/0525.htm>.

⁶⁸ Rachel Brandenburger, Intensification of International Cooperation: The Antitrust Division's Recent Efforts (Feb. 17, 2012), available at <http://www.justice.gov/atr/public/speeches/281609.pdf>.

⁶⁹ US-EU Merger Working Group- Best Practices on Cooperation in Merger Investigations (October 2011), available at : http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf.

167. One of the Antitrust Division’s main objectives⁷⁰ is to intensify its cooperative relationships and interactions with competition agencies around the world, especially with the newly established competition agencies⁷¹. The Antitrust Division works on encouraging the staff to be constantly “mindful of the international implications of our [enforcement] actions right from the very start of an investigation through to the remedial phase⁷².”

168. In addition, international networks and organisations have played a major and significant role in harmonising the legislations and procedures among enforcers and help engage in an open dialogue between international business communities and competition enforcers such as the OECD, ICN, UNCTAD, APEC and ASEAN, especially with the integration of emerging and developing economies.

169. The 2005 “ICN Recommended Practices for Merger Notification and Review”⁷³ have had a great and positive impact on several competition enforcement agencies, amending their laws and regulations to be more in line with the ICN practices for merger. Brazil has changed its merger review system in 2011 and 2012 to comply with the ICN practices, switching from a post merger to a pre-merger review system⁷⁴.

170. The ICN and OECD recently conducted a joint survey of competition authorities. The survey revealed that international cooperation is a policy priority for most agencies, is also useful for their enforcement efforts, and offers benefits outweighing the costs. The respondents also indicated that being able to exchange information with other agencies enhances effective cooperation on enforcement actions.

171. A recent joint survey of different competition authorities has been made by ICN and OECD, concluding international cooperation is a key priority for most agencies. It shows cooperation being very beneficial for their enforcement efforts, particularly the information exchange with other agencies and therefore enhancing effective cooperation on enforcement procedures⁷⁵.

IV. FINAL REMARKS

172. The spread of competition law and culture is a positive development in the world economy but has created many complexities among enforcement agencies. As trade and cross-border

⁷⁰ Rachel Brandenburger, The Many facets of International Cooperation at the Antitrust Division, (June 15, 2012), available at <https://www.justice.gov/atr/file/518996/download>.

⁷¹ Rachel Brandenburger, Intensification of International Cooperation: The Antitrust Division’s Recent Efforts (Feb. 17, 2012), available at: <http://www.justice.gov/atr/public/speeches/281609.pdf>.

⁷² Rachel Brandenburger, International Competition Policy and Practice: New Perspectives? (Oct. 29, 2010), available at <http://www.justice.gov/atr/public/speeches/270980.pdf>.

⁷³ ICN, Recommended Practices for Merger Notification and Review (2005), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

⁷⁴ Maureen K. Ohlhausen-Federal Trade Commission Commissioner, Update on International Cooperation and Convergence (June 13, 2013), available at : https://www.ftc.gov/sites/default/files/documents/public_statements/update-international-cooperation-and-convergence/130613antitrustchicagoupdate.pdf .

⁷⁵ Maureen K. Ohlhausen-Federal Trade Commission Commissioner, Update on International Cooperation and Convergence (June 13, 2013), available at : https://www.ftc.gov/sites/default/files/documents/public_statements/update-international-cooperation-and-convergence/130613antitrustchicagoupdate.pdf . See Philip Collins, The OECD/ICN Joint Survey on International Enforcement Cooperation: A Ground-Breaking Initiative, COMPETITION POLICY INT’L (2013), available at <https://www.competitionpolicyinternational.com/assets/Uploads/ICN2-26-2013.pdf>.

business increased and became more active, effective cooperation became even more complicated. Said complications in cooperation led to undesirable outcomes, which are reflected in inconsistent decisions and unchallenged illegal conduct.

173. Practitioners and enforcers should cooperate in order to overcome challenges and make international business more attractive in a healthy competition global environment. New and enhanced competition law cooperation should be established among different competition enforcement agencies, such as mechanisms for the secure exchange of information and the formation of international agreements, helping in the coordination when undertaking parallel investigations.